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**STATEMENT OF
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Before The:

**UNITED STATES SENATE COMMITTEE ON
HEALTH, EDUCATION, LABOR & PENSIONS**

Hearing On:

**PROTECTING THE EMPLOYMENT RIGHTS
OF THOSE WHO PROTECT
THE UNITED STATES**

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Washington, DC

Chairman Kennedy, Ranking Member Enzi, and members of the committee: good morning, and thank you for the opportunity to testify today on important matters of concern to our servicemembers, their families, and ultimately our national security.

My name is Scott J. Bloch and I am Special Counsel of the United States and head of the U.S. Office of Special Counsel (OSC).

This Sunday is Veterans' Day, a day for Americans to honor the sacrifice and dedication of those who have served, and those who serve today, to protect our nation. Members of the U.S. military serve our nation in combat and through their readiness for combat. As veterans returning to civilian life or continuing to serve as members of the National Guard and Reserve, they can be superb employees because of the skills they have acquired as members of the military.

Members of the U.S. military are graduates of one of the world's largest training organizations, with highly specialized knowledge in areas such as engineering, healthcare and information technology. Moreover, their military experience builds judgment, dedication, resourcefulness, and leadership – personal qualities that should be valued by employers.

This is the week before Veterans' Day, and it is especially appropriate time for us to examine how we can provide better support for members of our military who serve on active duty, and expect to be welcomed back by their civilian employers.

Unfortunately, not all employers understand their obligations to their employees who meet their own obligations to our nation through active duty service. Some servicemembers, mostly members of the National Guard and Reserve who return from active duty, many from combat duties in Iraq and Afghanistan, are turned away by their civilian employers or not afforded their full rights and benefits upon their return.

It is difficult to imagine an employer welcoming back a returning service member with words to the effect, "Welcome back – you're fired!" But it happens -- and not only in the private sector. Some members of the National Guard and Reserve, who also serve their country as federal civilian employees, find themselves returning from active duty to a government unwilling to take them back, or only willing to take them back with less pay, status, or benefits. While civilian employees of the federal government represent about ten percent of the National Guard and Reserve, they file a disproportionately greater percentage of claims under USERRA. Considering that the law specifies that the federal government is supposed to be a "model" employer, this is a disturbing trend.¹ The very government that sends them forth into combat might deny them their livelihood when they come marching home.

Reasonable people would cry, "There oughta be a law!" But there have been laws to protect the jobs of returning veterans since 1940, when the Veterans' Reemployment Rights (VRR) law was enacted. The VRR law served our nation reasonably well for more than half a century. Over the years, however, numerous piecemeal amendments and sometimes conflicting judicial constructions made the law confusing and cumbersome. There were also some loopholes in the VRR enforcement mechanism, especially as it applied to the federal government as a civilian employer.

¹ 38 U.S.C. § 4301(b).

Better protections were needed, and thirteen years ago, Congress enacted and President Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act of 1994, or USERRA. It strengthened the enforcement mechanism for federal employees by giving the Merit Systems Protection Board (MSPB) explicit jurisdiction to adjudicate allegations of USERRA violations by federal executive agencies as employers.

Under USERRA, a person claiming a violation by any employer (federal, state, local, or private sector) is permitted to make a complaint to the Department of Labor's Veterans' Employment and Training Service (DOL-VETS) which must investigate and attempt to resolve the matter. If DOL-VETS cannot resolve a complaint involving a private, state, or local employer, the individual may file a private lawsuit or request a referral to the Attorney General for possible representation in federal district court. If the employer is a federal executive agency, the individual may appeal to the MSPB or request a referral to OSC for possible representation before the MSPB and, if necessary, the U.S. Court of Appeals for the Federal Circuit.

Thus, the passage of USERRA expanded OSC's role as protector of the federal merit system and federal workplace rights by giving OSC prosecutorial authority over federal-sector USERRA claims. However, it also established a bifurcated process in which DOL-VETS first investigates and attempts to resolve such claims, followed by possible OSC prosecution before the MSPB when there is no resolution by DOL-VETS.

Recognizing the inefficiencies inherent in this process, as well as OSC's unique expertise in investigating and prosecuting federal employment claims, Congress passed the Veterans Benefits Improvement Act of 2004 (VBIA), which established a demonstration project whereby OSC receives roughly half of federal USERRA claims from the beginning (i.e., when they are filed and prior to investigation).² This demonstration project eliminated (for some claims) the often cumbersome, time-consuming, bifurcated process whereby federal USERRA claims bounce around different federal agencies before being resolved by allowing OSC to apply its extensive experience investigating other federal personnel laws to USERRA. By combining both the investigative and prosecutorial functions in one agency, Congress hoped to determine whether OSC could provide better service to federal employees filing USERRA claims.

The results of the demonstration project speak for themselves: OSC has obtained corrective action for service members in more than one in four USERRA claims filed with us. This is very high when you consider that the rate of positive findings and corrective action for governmental investigative agencies is usually well under ten percent. OSC achieves this high rate of corrective action through its thorough investigations, expert analysis of the law, ability to educate federal employers about the requirements of USERRA, and a credible threat of litigation before the MSPB.

In addition to obtaining corrective action for the individual claimant, in our role as protector of the federal merit system, OSC seeks "systemic" corrective action to prevent future violations by an agency. For example, we have assisted agencies in modifying their leave and

² Under the demonstration project, OSC has exclusive investigative jurisdiction over federal-sector USERRA claims where: 1) the claimant has a Social Security Number ending in an odd digit, or 2) the claimant alleges a Prohibited Personnel Practice (PPP) as well as a USERRA violation (regardless of Social Security Number). DOL-VETS retains investigative jurisdiction over all other federal-sector USERRA claims.

promotion policies to comply with USERRA, provided USERRA training to agency managers and HR specialists, and required agencies to post USERRA information on their websites and in common areas.

Our centralized and straight-line process has ensured that the USERRA claims we receive are resolved efficiently, thoroughly, and, most important, correctly under the law. The numerous corrective actions we have obtained for returning servicemembers include back pay, promotions, restored benefits and seniority, time off and systemic changes that prevent future USERRA violations where they work.

Congress tied the outcome of the USERRA demonstration project to an evaluation by the Government Accountability Office (GAO). OSC participated in the evaluations conducted by the GAO, but we were disappointed that their draft report did not meet the April 1, 2007 deadline mandated by Congress. Instead, the final report was published only a week before the congressional August recess. This left Congress with almost no opportunity to act on USERRA before the demonstration project concluded on September 30th. We appreciate that Congress enacted an extension of the USERRA demonstration project in the FY2008 Continuing Resolution.

Moreover, the GAO report did not address the central question that the demonstration project was intended to answer: are federal sector USERRA claimants better served when they are permitted to make their complaints directly to OSC, for both investigation and litigation, bypassing the bifurcated process? We submit that the answer is an emphatic "yes."

We of the U.S. Office of Special Counsel are privileged to be engaged in the enforcement of USERRA. Both as Special Counsel, and as a father of a Marine, I am proud of the work we are doing to protect the employment rights of those who give of themselves for our national security. We employ members of the National Guard and Reserve at OSC; my Deputy Special Counsel is a lieutenant colonel in the Marine Corps Reserve, and four of our recent hires served in the military and are still in the Reserve.

OSC is uniquely suited to assist members of the National Guard and Reserve who, upon their return from active duty, even from combat and with combat-related injuries, are turned away by their federal employers, or not afforded the full protections or benefits to which they are entitled. Because the mission of OSC is to protect the federal merit system, our specialized USERRA unit is staffed with attorneys and investigators who are experts in federal personnel law and have years of experience investigating, analyzing, and resolving allegations of violations of federal employment rights. We also just recruited a nationally-known USERRA expert, Sam Wright, a captain in the Navy Reserve, who helped draft the law and has written and spoken extensively about USERRA and the predecessor reemployment statute, throughout his career. He can assist us not only in the prosecution of complex cases but also in outreach and public affairs aspects of our work for veterans and active members of the National Guard and Reserve.

OSC is the only federal investigative agency that can provide a true single point of contact for federal employees making claims under USERRA. Even if Congress decided to return exclusive investigative jurisdiction to DOL-VETS, USERRA cases involving Prohibited Personnel Practices would still have to be passed to OSC. Granting OSC exclusive jurisdiction over the federal sector USERRA cases would ensure that federal employee claimants would benefit from having a single agency resolve their claim. For this reason, federal sector USERRA investigation and enforcement is a natural "fit" for OSC.

We are proud of our achievements enforcing USERRA. We have filed the first ever prosecutions by OSC in the law's history, obtaining corrective action in several cases that had been delayed for years or considered non-winnable. For example, the case of an Army Corps of Engineers employee, who was not reemployed after serving in the Air Force, remained unresolved until OSC received the case. We prosecuted before the MSPB and obtained full corrective action for the service member, including \$85,000 in back pay, reemployment in his former position, and full restoration of benefits. And, when an injured Iraq war veteran returned from duty only to be sent home by his federal employer because he could no longer perform his former job, we convinced the agency to find him a suitable job consistent with his physical limitations, along with back pay.

Cases that before took several years to come to no positive conclusion now routinely take well under a year for OSC to investigate and resolve favorably. We are committed to getting as much relief as the law allows for our brave service members, and doing so as quickly as possible. These patriots have given their all in the service of this great nation. They should never be hung out to dry by a long, drawn-out, confusing process. OSC is passionate about obtaining relief for all who come to us, and no less for the soldiers of our country who also serve in the federal government.

Moreover, giving OSC exclusive jurisdiction over USERRA federal sector claims would remove the burden from the Department of Labor's Veterans' Employment and Training Service to navigate federal personnel law, freeing them to focus on providing their best service to USERRA claimants from the private sector and those in state and local governments. Thus, the benefit to service members would be doubly positive – for federal service members who would benefit from OSC's specialized experience, and for those private sector service members who would benefit from greater attention to their claims at DOL-VETS.

Today, America is in the middle of the largest sustained military deployment in thirty years. That deployment but is not limited to the approximately 200,000 servicemembers in Iraq and Afghanistan at this moment. In recent years, the number of members of the National Guard and Reserve mobilized at one time peaked at more than 212,000. Last week, the Department of Defense reported that 93,898 members of the National Guard and Reserve had been mobilized and were on active duty. It is when these servicemembers end their active duty that they may find they are no longer welcome to return to their civilian jobs and are eligible to file a claim under USERRA.

Right now, with returning war vets a comparative trickle, USERRA claims are in the hundreds. What will happen if and when that trickle turns into a flood? Will we see a "spike" in the number of claims filed by returning servicemembers who have been turned away from their employers? Will the government demonstrate its support for our troops by being fully ready to provide prompt and effective action on these claims?

We don't know when they will start returning home in greater numbers, boosting demand for USERRA enforcement. We believe that adequate information has been developed to support a decision by Congress to assign the task of investigating and enforcing USERRA claims by federal employees to OSC. We are poised to assume this responsibility and to do our part in making their transition back to civilian life as smooth as possible.

Thank you for your attention and I look forward to your questions.